F. M. S. REPORTS

[APPELLATE CRIMINAL JURISDICTION]
HOWES, J.
December 7, 1934.

ABDULLAH ..... Appellant.

v.

PUBLIC PROSECUTOR ..... Respondent.

[PERAK MAGISTRATE'S CRIMINAL APPEAL No. 105 of 1934.]

The Criminal Procedure Code, 1926, Section 171—Procedure in summary trials—Power of Magistrate to discharge an accused person.

In a summary trial a Magistrate can only discharge an accused person under Sections 171 (g), 171 (n) or 252 (i) of the Criminal Procedure Code, 1926. Apart from these exceptions a Magistrate must acquit or convict the accused.

M. S. Mahendran for the appellant.
L. C. Simpson-Gray, Deputy Public Prosecutor, for the respondent.

Cur. Ad. Vult.

HOWES, J.—This is an appeal from the order of the Magistrate, Telok Anson, discharging the accused who was tried summarily on a charge of theft in a dwelling house under section 380 of the Penal Code.

The Magistrate after hearing all the evidence for the prosecution, and without calling upon the accused to enter upon his defence, reserved judgment, and in his written judgment decided that:—

> "the Court has no alternative but to discharge the accused and order that the sum of $13.00 found on him be returned to him."

It is from this order of "discharge" that the appellant now appeals.

Since this is neither an appeal against an acquittal under section 314 (a) of the Criminal Procedure Code, nor from a conviction under section 314 (b), the appeal can only come under sub-section (c), viz., one "from any other order" (of the Magistrate) in which case the power of the Appellate Court is limited to either dismissing the appeal, or altering or reversing such order.

The appellant asks "that the order of discharge may be reversed into an order of acquittal."

The basis of the appeal is section 171 (f) of the Criminal Procedure Code, which reads:—

> "If, upon taking all the evidence hereinbefore referred to, '(i.e., all the evidence produced in support of the prosecution)' the Court finds that no case against the accused has been made out which if unrebutted would warrant his conviction the Court shall record an order of acquittal."

From this sub-section it is clear that, in the circumstances, the proper procedure was for the Magistrate to have recorded an order of acquittal.

The only cases in which, in a summary trial, the Magistrate can 'discharge' an accused are (1) under Section 171 sub-section (g), where, in the course of, and before the completion of the evidence for the prosecution the Magistrate considers the charge to be groundless; (2) under sub-section (n) when, in a private prosecution of a compoundable offence the complainant is absent; and (3) under section 252 (i), where, if the accused is not further prosecuted upon the charge by the officer conducting the prosecution, the proceedings may be stayed by leave of the Court, and the accused be 'discharged of and from the same'.

Sub-section (g) of section 171 has been imported into the Federated Malay States procedure in summary trials from section 253 (2) of the Indian Code of Criminal Procedure which deals with the trials of "Warrant Cases". In India, although I have not access to the cases quoted, it has been held that if in the trial of a "Summons Case", under section 245 (i) (which is analogous to the Federated Malay States procedure in summary trials), the Magistrate finds no case made out against the accused and lets him go unconditionally, he acquits the prisoner, though the Magistrate may style his order of acquittal an order of discharge, and tack on to it the number of the section of the Code which deals with the discharges: and that the accused is none the less in law, acquitted: for the Indian Code in such a case contemplaes no other order in Summons-cases—see *Sohoni*, Code of Criminal Procedure, 13th Ed. p. 610.

Further it is to be noted that in *Reg.* v. *Monteiro*, 4 Kyshe 556, it was held that in a compoundable case of assault, a "discharge" implied an acquittal, and that therefore there could be no second trial.

This, in my view, appears to have been the intention of section 171 of the Federated Malay States Criminal Procedure Code. The whole object of summary jurisdiction is to dispose of a case conclusively and expeditiously.

The Federated Malay States Criminal Code, with the exceptions above mentioned, only contemplates two courses as being open to the Magistrate in Summary trials, viz., to acquit or convict. Whichever he does, it is then open to the accused person to appeal from the conviction, or to the Public Prosecutor to appeal against the acquittal.

In the present case, it is evident, from his judgment, that the Magistrate was of opinion that no case against the accused had been made out which if unrebutted would warrant his conviction.

Whether the Magistrate was correct in this respect, I am not called upon to decide in the

present appeal. In the circumstances, the use of the word "discharge" was contrary to sub-section (f), and was clearly wrong; and therefore I have no alternative but to allow the appeal, and under section 314 (c), to alter the Magistrate's order of discharge to one of acquittal.

Appeal allowed.

[ORIGINAL CIVIL JURISDICTION]

HOWES, J. ....

February 8, 1935.

CHEAH CHEONG PHENG ..... **Plaintiff.**

vs.

GOVERNMENT OF THE FEDERATED MALAY STATES .....**Defendant.**

[PERAK CIVIL SUIT No. 154 of 1934]

The Government Suits Enactment, 1928, section 11 (ii) (a)—False imprisonment—Action for damages—The Public Authorities Protection Enactment, 1929, section 2 (ii).

By section 11 (ii) (a) of the Government Suits Enactment, 1928, the subject can only sue the Government if it is shown that the public officer concerned would have been liable in his personal capacity.

Therefore in an action against Government claiming damages for false imprisonment the plaintiff must prove malice or negligence and absence of reasonable or probable cause on the part of the public officer concerned.

V. A. Lyons for the plaintiff.

John L. Woods for the defendant.

HOWES, J.—This is an action for damages for false imprisonment. In these States the subject seems to be given greater powers to sue Government than in other places. In England, for instance, this will be a tort, and the suit would be against the Government only by petition of right. Here, the Enactment No. 20 of 1928 specifically entitles the subject to sue Government if the claim is one which can be enforced as between subject and subject, and therefore includes the right to sue Government in tort. That is by Section 10.

There is however, this important limitation; by Sub-section (ii) (a) of Section 11—

> "No suit shall lie against the Government in respect of any act, neglect or default committed by any public officer, unless proceedings for damages in respect of that act, neglect or default would have lain against that officer personally."

The result is, that the subject can only sue the Government if it is shown that the public officer concerned would have been liable in his personal capacity; and unless he is so liable, it is clear that no action can be brought against the Government.

Now, in a case of this nature, for false imprisonment, the only people who would be liable as private individuals (or as between subject and subject) would be the persons who laid the information, that is, Kandiah, if he wrongly induced the Magistrate to issue the Warrant; and secondly the Magistrate himself, if he had been negligent or corrupt in issuing the warrant.

There is a second proviso which controls the matter, that no suit shall lie against the Government for or in respect of anything done or omitted to be done in the furtherance of or in execution of any judicial proceedings or process. Clearly the issue of a warrant is something done in the execution of or furtherance of judicial proceedings.

Then there is the question of the liability of the Magistrate or the person who laid the information, namely, Kandiah; and it becomes necessary to refer to the Public Authorities Protection Enactment No. 20 of 1929. There is no suggestion that these officers were not acting in the execution of their duties.

Section 2 (ii) of that Enactment puts on the plaintiff the onus of alleging that the defendant (i.e. the officer concerned), acted maliciously or negligently or without reasonable or probable cause; and if at the trial the plaintiff fails to prove such allegation, judgment shall be given for the defendant.

It seems to me essential in this case for the plaintiff to prove something which would have rendered the individual officer liable personally, and that would necessitate proving that the officers in question or one of them, (whoever was responsible), acted maliciously or negligently and without reasonable or probable cause.

The plaintiff has called no witnesses except himself, and there is nothing before me to show that the officers in question acted maliciously or negligently.

When it comes to the question of probable or reasonable cause, from the evidence which the defence has given, it is shown that there had been an offence committed with regard to the smuggling of tin. I think, in that connection, four persons were prosecuted, and although two of them were discharged, and the plaintiff ultimately was discharged, there is nothing to show that the prosecutions were instituted without reasonable or probable cause. Still less is there anything to show the officers concerned acted maliciously or negligently. On the contrary, the evidence shows they were perfectly justified in adopting the course which they did. As I said before the crux of the present case is, it is essential for the plaintiff to show, before he can make the Government liable, that some individual officer would have been personally liable, under Section 11 (ii) (a) of Enactment 20 of 1928, and in the absence of such proof, no action lies against the Government. For these reasons I must give judgment for the defendant and dismiss the suit with costs. I order costs on higher scale.

Action Dismissed.